STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
[Henry William Saad, Mark T. Boonstra, Joel P. Hoekstra]

UPPER PENINSULA POWER COMPANY,	Supreme Court No. **153116**
Appellant,	Court of Appeals No. 321946
v	MPSC Case No. U-17077
ENBRIDGE ENERGY, LIMITED PARTNERSHIP and MICHIGAN PUBLIC SERVICE COMMISSION,	
Appellees. /	
MICHIGAN PUBLIC SERVICE COMMISSION,	Supreme Court No. **153118**
Appellant,	Court of Appeals No. 321946
v	MPSC Case No. U-17077
ENBRIDGE ENERGY, LIMITED PARTNERSHIP,	
Appellee. /	

SUPPLEMENTAL BRIEF ON APPEAL OF APPELLEE MICHIGAN PUBLIC SERVICE COMMISSION

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

In a 2009 rate case, the Commission approved a settlement agreement between UPPCo, Commission Staff, and numerous intervening parties that contained a revenue decoupling mechanism (RDM). The agreement resolved a dispute about whether these mechanisms were lawful for electric utilities. As a party to the settlement, UPPCo was entitled to rely on the final judgment from MPSC Case No. U-15988. Though it received notice, Enbridge did not intervene in the rate case and was not a party to the settlement agreement. Enbridge then collaterally attacked the settlement agreement in a later case – this one – after the Court of Appeals held in *Detroit Edison* that electric decoupling mechanisms are unlawful. Relying upon *Detroit Edison*, Enbridge argued that the RDM in the prior rate case was unenforceable and void. The Court of Appeals agreed and effectively set aside the settlement agreement, even though that case was not on appeal and no statute or court decision prohibited these mechanisms at the time the Commission approved the settlement agreement. With this background, the Commission addresses this Court's questions but reorders the questions for ease of analysis:

1. Does Enbridge's failure to intervene in the 2009 rate case bar Enbridge from challenging the Commission's order approving the settlement in that case?

   Appellant UPPCo's answer: Yes.

   Appellant Commission's answer: Yes.

   Appellee's answer: No.

   Court of Appeals' answer: Did not answer.

2. Is *Dodge v Detroit Trust Co*, 300 Mich 575, 613 (1942) relevant to this case and did the Court of Appeals misapply *Dodge* by holding that the Commission exceeded its statutory authority when it enforced a settlement agreement that included an electric revenue decoupling mechanism?

   Appellant UPPCo's answer: Yes.

   Appellant Commission's answer: Yes.

   Appellee's answer: No.

   Court of Appeals' answer: No.

3. Even if *Dodge* is inapplicable, was the settlement agreement nevertheless enforceable because there is no allegation of mutual mistake, fraud, coercion, or unconscionability?

Appellant UPPCo's answer:	Yes.
Appellant Commission's answer:	Yes.
Appellee's answer:	No.
Court of Appeals' answer:	Did not answer.

INTRODUCTION

At risk in this case is the Commission's ability to settle utility rate cases. If the lower court's opinion stands, the Commission may never settle another rate case. Utilities will be unwilling to settle rate cases because settlement agreements would no longer provide the utility with any certainty. Any person unhappy with new rates could attack an order approving the settlement that has become final despite never having exercised the right to intervene in the rate case. Without settlements, the Commission will have to decide each issue, and as this Court is likely aware, almost every single rate case the Commission decides is appealed. This will increase the burden on the Commission, the Court of Appeals, and ultimately, on this Court.

There are three paths to the same result in this case – three legal principles that could each control the outcome. First, the law does not permit collateral attacks on a final order as a matter of finality and because the Commission need not relitigate issues fully litigated in a prior case absent presentation of new evidence. Second, courts may not disregard settlement agreements absent mutual mistake, fraud, or unconscionability. Third, a settlement agreement resolving a disputed issue of law survives a later court decision resolving the issue differently.

These three legal principles are under fire in this case, and require this Court's attention to clarify, elevate, protect, and preserve their status. Correctly applied, these legal tenets govern the outcome of this case. The first tenet explains why Enbridge is procedurally barred from challenging the orders at issue, the second explains why courts honor settlement agreements of disputed issues of law

as this Court recognized in *Dodge v Detroit Trust Co,* 300 Mich 575, 613 (1942), and the third why Enbridge may not challenge the settlement agreement at issue.

The first legal principle has a muddy past, but this case could clear the water. The rule against collateral attacks has often been cited but rarely distinguished from collateral estoppel and res judicata. This case provides the Court with an opportunity to clarify the differences. It is rooted in considerations of finality. And it is supported by the closely related legal principle, long recognized by the Court of Appeals, that the Commission does not have to relitigate issues that it decided in earlier cases. This Court, however, has not ruled on the question, so while it may not yet have a permanent place in the state's legal landscape, this case could put it firmly on the map. As in any other case, whether a party or not, a person should not be able to collaterally challenge a final judgment that was entered by a court with jurisdiction.

The second principle allows parties to enter into settlements on a disputed issue of law. If a later decision may transform an earlier settlement agreement into a disputed one, all settlements are placed in jeopardy. The Court of Appeals' decision casts doubt on the continuing value of this Court's *Dodge* decision, which summarized the rule governing disputes of law that dates back more than a century. The lower court's decision would likely relegate this rule entirely to the annals of history.

The third legal principle is a cornerstone of our legal system, and this is just one more case built on its foundation. The settlement agreement in this case is at

the center of the debate, and it cannot be shaken. Our legal system has long protected settlement agreements absent evidence of fraud, coercion, or mistake. There was no evidence of foul play below. Although Enbridge claims the agreement was illegal because one of its terms conflicts with a later court decision, no other Michigan court has ever voided a settlement agreement for this reason.

This Court should uphold these three legal tenets, and apply them correctly to reverse the Court of Appeals and affirm the Commission's determination that the settlement agreement must stand inviolate.

ARGUMENT

I. Enbridge's failure to intervene in prior cases procedurally barred the company from challenging the MPSC's prior orders resulting from those cases.

Enbridge is procedurally barred from challenging the orders at issue in this case. As an initial matter, Enbridge's complaint case (the case on appeal) was a collateral attack on the Michigan Public Service Commission's (MPSC or Commission) prior orders. Enbridge did not attempt to intervene in the cases or appeal the orders; instead, it waited until the Commission had issued the orders before filing a petition for rehearing and a complaint. Moreover, Enbridge is procedurally barred by issue preclusion. Although collateral estoppel does not strictly apply in rate cases, courts have long held that the Commission does not have to revisit issues that it addressed in earlier orders.

These procedural issues were raised in the Commission proceeding below, but in its order requesting supplemental briefing, this Court properly recognized that they deserve more attention.

A. Enbridge may not collaterally attack orders after declining to participate in the underlying cases or appeal the resulting orders.

Collateral attack occurs "whenever a challenge is made to a judgment in any manner other than through a direct appeal." *People v Howard*, 212 Mich App 366, 369 (1995), citing *People v Ingram*, 439 Mich 288, 291 (1992). "[F]ailure to file an appeal from the original judgment . . . precludes a collateral attack on the merits of that decision." *Kosch v Kosch*, 233 Mich App 346, 353 (1999). This is a long-

standing rule. See *In re Hatcher,* 443 Mich 426, 438–439 (1993), citing *Jackson City Bank & Trust v Fredrick,* 271 Mich 538, 545–546 (1935) ("Where jurisdiction has once attached, mere errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void, and until set aside it is valid and binding for all purposes and cannot be collaterally attacked.") The rule complements the court rules that allow parties to obtain relief from final judgments in extraordinary circumstances. MCR 2.612(C)(1). Moreover, as discussed below, although courts have held that the doctrines of collateral estoppel and res judicata do not strictly apply in rate cases or to third parties, no court has held that the rule against collateral attacks does not apply in Commission cases or to third parties.

Enbridge may not collaterally attack the Commission's orders at issue in this case because Enbridge received notice of the proceedings but did not exercise its right to intervene.

1. The rule against collateral attacks, which protects final orders from later challenges, should apply in Commission proceedings.

The rule against collateral attacks is often considered together with the doctrines of collateral estoppel and res judicata, but each doctrine is distinct. See *Trahan v Superior Oil Co*, 700 F2d 1004, 1019 (CA 5, 1983) ("The 'collateral attack' rule is perhaps a close cousin of res judicata and collateral estoppel. . . . However, these doctrines . . . differ somewhat from the collateral attack rule here considered

. . . ."); see also *Fransen v Conoco, Inc*, 64 F3d 1481, 1487 (CA 10, 1995) ("Although related, the rule against collateral attacks and the common law doctrine of collateral estoppel or issue preclusion are not the same.") As one court put it, "These three doctrines . . . apply in different circumstances and they prevent different things. Unfortunately, the distinctions between and among them are not often clearly understood." *Klein v Whitehead*, 389 A2d 374, 381 (Md App, 1978).

Michigan courts have not always distinguished the rule against collateral attacks from collateral estoppel or res judicata, but the distinctions are evident. Consider res judicata, which "bars relitigation of *claims* that are based on the same transaction or events as a prior suit." *Ditmore v Michalik,* 244 Mich App 569, 577 (2001) (emphasis added); see also *Adair v State,* 470 Mich 105 (2004) (reflecting standards for res judicata under Michigan law). Res judicata stands in contrast to collateral estoppel, or issue preclusion, which "precludes relitigation of an *issue* in a subsequent, different cause of action between the same parties" if the issue was actually litigated earlier and decided by a final judgment. *Ditmore*, 244 Mich App at 577 (emphasis added). The rule against collateral attacks is different still. The focus of this rule is on *parties* who sleep on their rights while a case is litigated and a judgment is issued, only to later challenge the judgment when it is expedient to do so. See *United Student Aid Funds, Inc v Espinosa*, 559 US 260, 275 (2010) ("Rule 60(b)(4) [which grants parties relief from void judgments] does not provide a license for litigants to sleep on their rights.")

Perhaps the best discussion of the distinctions between these three doctrines comes from a small Maryland intermediate appellate court. In *Klein*, 389 A2d at 385, the Maryland Court of Special Appeals said that the purpose of res judicata and collateral estoppel is "not to attack the existence or validity of a judgment or decree, but rather to question the effect of that judgment or decree . . . ." By contrast, the rule against collateral attacks "prevents a person from challenging the validity of the existing judgment [by] attacking the judgment itself rather than merely its scope or effect." *Id*. at 386. The rule against collateral attacks "is concerned with the circumstances under which and the extent to which [judgments] may be impeached and shown to be invalid." *Id*. (quotation marks and citation omitted.)

The rule against collateral attacks is not only different from collateral estoppel and res judicata, it is also broader than these doctrines in two ways.

First, although courts have held that collateral estoppel and res judicata do not strictly apply in some Commission cases, *In re Consumers Energy Co*, 291 Mich App 106, 122 (2010), courts have never said that the rule against collateral attacks does not apply in Commission cases. This is why Enbridge's collateral attack is barred in this case.

Second, unlike collateral estoppel, the rule against collateral attacks applies to third parties as much as it applies to parties. This is true for family law and tax law. *Estes v Titus*, 481 Mich 573, 588 (2008) (family law); *Goodrich v City of Detroit*, 123 Mich 559, 564 (1900) (tax law). It should be true for administrative law as well.

Enbridge's third-party status (particularly when it had notice and an opportunity to intervene) should not exempt it from the rule against collateral attacks. The same rule should apply here as to any case that results in a final judgment under Michigan law: a party cannot collaterally challenge the decision of a court with jurisdiction. *In re Hatcher,* 443 Mich at 438–439. The proper recourse is to intervene and then bring an appeal.

This is particularly true in Commission cases where the Court of Appeals has allowed interested nonparties to appeal Commission orders. See *Midland Cogeneration Venture Ltd v Pub Serv Comm*, 199 Mich App 286, 293 (1993), citing MCL 462.26 (governing appeals of Commission orders).

Other jurisdictions have confirmed that the collateral attack doctrine is broader than collateral estoppel and res judicata because it applies in administrative proceedings and bars attacks from third parties. For example, in an administrative proceeding, the United States Court of Appeals for the Tenth Circuit rejected a mineral right owner's attempt to collaterally attack an Oklahoma Corporation Commission order denying an application to drill a well. It held, "The collateral attack doctrine can apply even where collateral estoppel does not." *Fransen*, 64 F3d at 1487, citing *Trahan,* 700 F2d at 1019. The Tenth Circuit Court also held that it did not matter that the owner was not a party to the earlier proceeding: "[A] person can be barred from collaterally attacking an order entered in a proceeding to which he or she was not a party." *Id.*

Although the rule against collateral attacks and the doctrines of collateral estoppel and res judicata have different applications, they are all driven by the same overarching concerns about finality. *Klein v Whitehead*, 389 A2d at 381 ("All three of these derive immediately from the larger jurisprudential demand that properly entered judgments be regarded as final, a concept which itself emanates from, and is required by, the societal need for certainty in the law."). This Court has specifically held that the rule against collateral attacks "implicate considerations of finality and administrative consequences." *Ingram*, 439 Mich at 300. In *Ingram*, this Court warned that "[e]very inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice." *Id*. (quotation marks and citation omitted.)

Finality is so important that courts have immunized judgments from collateral attacks even if they "may have been wrong or rested on a subsequently overruled legal principle." *Colestock v Colestock*, 135 Mich App 393, 398 (1984). Finality is the reason why "[n]ew legal principles, even when applied retroactively, do not apply to cases already closed. This is because at some point, the rights of the parties should be considered frozen and . . . final." *People v Maxson*, 482 Mich 385, 387–388 (2008) (quotation marks and citations omitted). It is also the reason why the Court of Appeals has concluded that a "plaintiff cannot obtain relief from a final judgment . . . based upon a partially retroactive change or clarification in the law." *King v McPherson Hosp*, 290 Mich App 299, 304 (2010).

Under the Michigan Court Rules, a person may seek relief from a judgment for one of six reasons. Absent one of the following grounds, judgments are final and may not be collaterally attacked:

> (a) Mistake, inadvertence, surprise, or excusable neglect.
>
> (b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).
>
> (c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.
>
> (d) The judgment is void.
>
> (e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.
>
> (f) Any other reason justifying relief from the operation of the judgment.[1] [MCR 2.612(C)(1).]

Although this rule seems to leave the door wide open to collateral attacks, it does not: "Well-settled policy considerations favoring finality of judgments circumscribe relief under MCR 2.612(C)(1)." *Rose v Rose*, 289 Mich App 45, 58 (2010). Specifically, "The first five grounds for vacating a judgment, subrules (a) through (e), delineate narrow, time-critical pathways for relief." *Id.*; MCR 2.612(C)(2). And as for subrule (f), it is the widest avenue for relief, but "competing concerns of finality and fairness counsel a cautious, balanced approach to subrule (f), lest the

[1] The MPSC's Rules of Practice and Procedure do not specifically address relief from final judgments, but they do adopt these rules by reference. See Mich Admin Code, R 792.10403 ("In areas not addressed by these rules, the presiding officer may rely on appropriate provisions of the currently effective Michigan court rules.").

scale tip too far in either direction." *Id.* Extraordinary circumstances, usually involving party misconduct, must exist to grant relief under this rule, and courts will not set aside the judgment if it detrimentally affects the opposing party's rights. *King*, 290 Mich App at 305.

The United States Supreme Court has even emphasized the need for finality when discussing possible relief from court orders. The Court interpreted Rule 60(b)(4) of the federal rules of civil procedure (the federal equivalent to MCR 2.612(C)(1)(d)), which grants parties relief from void judgments, in *Espinosa*, 559 US at 273–276. The Court held that this rule "strikes a balance between the need for finality of judgments and the importance of ensuring that litigants have a full and fair opportunity to litigate a dispute." *Id.* at 276. In striking this balance, the Court denied the United Student Aid Fund relief under Rule 60(b)(4) from a bankruptcy court's ruling when it had actual notice of the proceeding. United, the Court said, was "afforded a full and fair opportunity to litigate, and the party's failure to avail itself of that opportunity will not justify Rule 60(b)(4) relief." *Id.* at 276.

Finality is as much a concern in Commission cases as it is in judicial proceedings. Utilities rely on the rates set in final orders to project their future revenue, while customers rely on these rates to project their future electric costs. This is perhaps why "[o]ur Legislature and Supreme Court have recognized the need for validity and finality in rate-making proceedings." *CMS Energy Corp v Attorney General*, 190 Mich App 220, 229 (1991), citing MCL 462.25 and *Building*

Owners & Managers Ass'n v Pub Serv Comm, 424 Mich 494, 507 (1986). If utilities and customers cannot rely on final rate orders for fear that the orders will be challenged in later proceedings, they will find it hard to plan for the future. More specifically, for this case, invalidating UPPCo's revenue decoupling mechanism jeopardizes the entire final rate order approving the mechanism.

The settlement agreement creating UPPCo's revenue decoupling mechanism included the following provision: "If the Commission does not accept this settlement agreement without modification, this settlement agreement shall be withdrawn and shall not constitute any part of the record in this proceeding or be used for any other purpose whatsoever." (*In re Upper Peninsula Power Co's Application for Rate Increase*, MPSC Case No. U-15988, Settlement Agreement (December 11, 2009), pp 5–6, Attachment 2 to the MPSC's Application for Leave to Appeal.) No appeal was taken from the order approving the settlement agreement.

In a separate Commission case, with its own Commission number, the Court of Appeals has instructed the Commission to modify the agreement in the former case by disregarding the decoupling mechanism included in it. This is a classic case of a collateral challenge. If the Commission is forced to modify the agreement, by the settlement's own terms, the agreement is void *ab initio* and the entire rate case will have to be relitigated, years after the case when testimony has gone stale and witnesses may no longer be available. The purpose of foreclosing collateral challenges – offending finality and requiring relitigation – is violated by the

decision here. The final orders of the Commission should be accorded the same respect as other judgments.

For these reasons, the rule against collateral attacks should apply in Commission cases to prevent parties from challenging final orders in earlier proceedings.

2. The rule against collateral attacks prevents Enbridge from challenging the orders at issue in this case.

Enbridge, even though it was not a party to the cases at issue, should not be allowed to collaterally attack the orders in those cases. Enbridge's complaint case and appeal call two Commission orders into question: the order approving the settlement agreement that first created UPPCo's revenue decoupling mechanism and the order that first reconciled the mechanism (comparing actual revenue with the base revenue levels established in the rate case and crediting or charging customers for over- or under-recoveries). If Enbridge wanted to challenge the Commission's orders, it should have intervened, participated, and appealed the orders. It cannot now collaterally attack these orders. See *Kosch*, 233 Mich App at 353. Allowing a collateral attack would undermine otherwise final Commission orders and prejudice the parties who spent time and resources intervening and participating in these cases.

UPPCo or another party could seek to completely nullify the entire settlement agreement and require a new rate case. At a minimum, the Commission will face the challenging task of unraveling the decoupling mechanism years after

its operation. The mechanism was included in two UPPCo rate cases after the one at issue here, and there have been several reconciliation proceedings as well. Undoing the mechanism will require complex accounting. UPPCo under-collected in some years and over-collected in other years, and it collected different amounts from different customer groups each year. So a remand would not only affect Enbridge; it would affect UPPCo, every other party to the settlement, and UPPCo's ratepayers as well.

Enbridge cannot collaterally attack the orders at issue because Enbridge was a third party with notice. Where a party is notified about a proceeding but does not object, the party may not collaterally attack the order. In *Royal Oak v Roseland Park Cemetery Ass'n*, 22 Mich App 651 (1970), the Roseland Park Cemetery (the defendant) received proper notice that Royal Oak was building a sidewalk next to the cemetery, but the defendant did not object. When it later refused to pay the special assessment for the sidewalk, the Court held that "the defendant's own inaction" prevented it from challenging the assessment. *Id*. at 654.

The question would be different if Enbridge did not receive adequate notice. If notice had been deficient, there is an argument that Enbridge could have collaterally attacked the orders at issue. In *Barnes v Curry*, 232 Mich 532, 537 (1925), this Court held that Barnes as a party was free to collaterally attack a judgment for restitution because he was not "served with a summons, he was not served with the order of publication, and there is no evidence that the order was

ever published."[2] Of course, Enbridge was *not* a party to the case, so even these decisions are distinguishable. Regardless, unlike Barnes, Enbridge and all of UPPCo's ratepayers received notice of both the rate case and the reconciliation proceeding at issue here.

Enbridge had the option to intervene. UPPCo notified all municipalities and counties in its service territory about the cases; it also notified all intervenors in its last rate case. (Case No. U-15988, 7/31/09 DeMerritt Aff, Notice, and Proof of Publication, p 2, Appendix A to this Brief; Case No. U-16568, 6/17/11 Kyto Aff, Notice, and Proof of Publication, p 2, Appendix B to this Brief.) Notice was published in the Daily Press, the Daily Mining Gazette, the Daily News, and the Mining Journal. (Case No. U-15988, 7/31/09 DeMerritt Aff, pp 12–18; Case No. U-16568, 6/17/11 Kyto Aff, p 12–22.)

Many parties took advantage of the opportunity to intervene in these cases; Enbridge chose not to intervene. The Michigan Technological University, Smurfit Stone Container Corporation, Calumet Electronics Corporation, and MPSC staff all intervened in the rate case. (Case No. U-15988 8/3/09 Hr'g Tr, p 5, Appendix C to this Brief.) And both Calumet Electronics Corporation and the MPSC staff intervened in the reconciliation proceeding. (Case No. U-16568 6/30/11 Hr'g Tr, p 4,

[2] Under MCR 2.612(B), a party that did not receive notice of a proceeding and had no knowledge of it also has the option to enter an appearance and challenge the judgment within one year after it was issued. "[I]f the defendant shows reason justifying relief from the judgment and innocent third persons will not be prejudiced, the court may relieve the defendant from the judgment, order, or proceedings for which personal jurisdiction was necessary . . . . *Id.*

Appendix D to this Brief.) Enbridge did not intervene in the rate case or the reconciliation proceeding, but it and all the utility's other customers had the option to do so. Enbridge cannot reasonably claim that it lacked notice or that there was any other procedural defect that opened the door to a collateral attack.

When considering whether Enbridge's complaint was indeed a collateral attack, this Court's decision in *Estes*, 481 Mich 573 should guide the inquiry. The *Estes* Court considered several factors when deciding whether a claim amounted to a collateral attack of a court's judgment in another case. This Court acknowledged that third parties generally may not collaterally attack divorce judgments (except for lack of jurisdiction), but it held that seeking relief for a fraudulent transfer in a divorce judgment is not a collateral attack because it "does not invalidate the divorce judgment itself." *Id*. at 588. Further, since creditors may not intervene in divorce cases, the only way for a creditor to challenge the fraudulent transfer in divorce proceedings is through a separate action. *Id*. at 589. As a result, the *Estes* Court rejected arguments that Jan Estes (a creditor) was collaterally attacking the divorce judgment.

The same factors apply when deciding whether Enbridge collaterally attacked the Commission's order in this case, but these factors lead to the opposite conclusion. First, the Commission had jurisdiction in this case. The Court of Appeals acknowledged it, *Enbridge Energy Ltd Partnership v Upper Peninsula Power Co*, 313 Mich App 669, 675 (2015), and Enbridge has not appealed that ruling. Second, unlike Estes' claim, which would not have invalidated the divorce

judgment, Enbridge's complaint threatened to upend the settlement agreement and orders at issue. (See the MPSC's Application for Leave to Appeal, pp 23–24.) Third, where Estes was precluded from intervening in the divorce proceeding as a creditor, Enbridge was not precluded from intervening in the rate case or reconciliation proceeding – Enbridge simply decided not to do so. For these reasons, this Court should not allow Enbridge to collaterally attack the Commission's orders.

B. The Commission did not have to relitigate issues it addressed in an earlier case.

Even if this Court finds that the rule against collateral attacks does not apply, there is still no reason for the Commission to revisit the issues that Enbridge raises and that the Commission already considered. The Court of Appeals has long held that the Commission does not have to relitigate issues it decided in earlier cases. *Pennwalt Corp v Pub Serv Comm*, 166 Mich App 1, 9 (1988). Although the Court of Appeals acknowledged that ratemaking is a legislative function and that "res judicata and collateral estoppel cannot apply in the pure sense" in rate cases, it said this does not mean that the Commission must completely relitigate issues from earlier cases. *Id*. Instead, the court placed "the burden on plaintiff to establish by new evidence or by evidence of a change in circumstances" that the result should be different. *Id*.

Besides *Pennwalt*, there have been many other instances when the Commission has precluded parties from raising the same issues time after time in rate cases. In one case, for example, the Commission decided not to review capacity

charges in a contract that was approved in an earlier case. *Consumers Power Co v Pub Serv Comm*, 196 Mich App 436, 445 (1992). In another case, the Commission rejected a ratepayer's renewed complaint about a utility's appliance service plan because the Commission had already litigated the complaint in an earlier case. *In re Consumers Energy Application*, 291 Mich App 106 (2010). In both cases, the Court of Appeals relied on *Pennwalt* to affirm the Commission's decision not to relitigate these issues. *Consumers Power Co*, 196 Mich App at 447; *In re Consumers Energy Application*, 291 Mich App at 122.[3]

In addition to these published decisions, there have also been many unpublished opinions decided on the same grounds. See, e.g., *In re Consumers Energy Co*, unpublished opinion per curiam of the Court of Appeals, issued October 30, 2012 (Docket No. 295287), p 5, Appendix E to this Brief ("Appellants failed to present any new evidence or changed circumstances that would render the PSC's decision in error."); see also *In re Detroit Edison Co.*, unpublished opinion per curiam of the Court of Appeals, issued February 19, 2015 (Docket No. 316728), p 6, Appendix F to this Brief ("Appellants have not shown that new evidence or any changed circumstances render that [earlier] decision unreasonable."), lv den 499 Mich 868 (2016).

Despite *Pennwalt* and other Court of Appeals decisions, this Court has not explicitly decided whether the Commission must reconsider issues litigated in

[3] Courts have even said that the statutory requirements for a full and complete hearing can be satisfied by evidentiary hearings from an earlier case addressing the same issue. *Consumers Power Co v Pub Serv Comm*, 192 Mich App 180, 186 (1991).

earlier rate cases, but this case presents an opportunity to do so. If the Court reaches this question, it should confirm that the Commission does not need to relitigate issues unless circumstances change or new evidence comes to light.

Pennwalt and the principles it embraces stem from the same concerns about finality that drive the rule against collateral attacks and the doctrines of collateral estoppel and res judicata. These concerns are diminished *for some issues* in rate cases – like determining a utility's capital investments, operating costs, and return on equity – that change from case to case and must be reconsidered each time. *For other issues*, however, concerns about finality are just as strong as they are in judicial proceedings. A Commission order deciding these issues should be conclusive and should not be relitigated unless something changes.

Pennwalt has endured for many years and has been a prevailing force in many cases for good reason: it promotes administrative efficiency. As the *Pennwalt* court succinctly put it, "To have the same proofs, exhibits, and testimony repeated would be a waste of the commission's resources." *Id.* at 9; accord *Consumers Power Co*, 196 Mich App at 447 ("It would clearly be a waste of resources" to relitigate "issues already settled.") Parties are not prejudiced by *Pennwalt* because they still have the opportunity to raise an issue a second time *if* they can demonstrate that circumstances have changed or that there is newly discovered evidence. See *Consumers Power Co*, 196 Mich App at 447–448 (holding that the utility had an opportunity to present new evidence or to show that circumstances had changed, but it did not.)

If this Court applies *Pennwalt* in this case, it should find that the Commission does not have to revisit issues that it decided in an earlier case. The settlement agreement with UPPCo was entered in Case No. U-15988 in 2009. In Enbridge's complaint in Case No. U-17077, it asked the Commission to reconsider the order in Case No. U-16568 (reconciling UPPCo's revenue decoupling mechanism based on the settlement agreement) in light of the Court of Appeals' decision in *In re Detroit Edison Co*, 296 Mich App 101 (2012). But the Commission had already considered the effect of that decision. While Case No. U-16568 was ongoing, the Court of Appeals issued the *Detroit Edison* decision overturning Detroit Edison's electric decoupling mechanism. The parties to Case No. U-16568 (not Enbridge) brought this decision to the Commission's attention, and the Commission addressed it in the final order. *In re Upper Peninsula Power Co's 2010 Reconciliation*, order of the Public Service Commission, entered August 14, 2012 (Case No. U-16568), p 4 (Attachment 3 to the MPSC's Application for Leave to Appeal).

The Commission held that *Detroit Edison* did not prohibit UPPCo from carrying out the agreement that the Commission had approved earlier, which created the revenue decoupling mechanism. *Id.* Although the Commission acknowledged that *Detroit Edison* prevented it from approving decoupling mechanisms going forward, it also noted that UPPCo entered into the settlement agreement creating the mechanism before that decision was issued. *Id.* And since the agreement was a binding contract, the Commission held that UPPCo could

reconcile its mechanism in accordance with the language in the agreement without further approval. *Id.*

Although it was not a party to the original case that gave rise to the settlement, Case No. U-15988, and was not a party to the reconciliation action brought by UPPCo in Case No. U-16568, Enbridge filed a petition for rehearing in Case No. U-16568 and a complaint in Case No. U-17707. The Commission denied the rehearing request since Enbridge lacked standing, as it was not a party. Enbridge did not appeal the Commission's orders in Case No. U-16568. Thus, the decision of the Court of Appeals here was from an appeal of an original action, asking to undo a settlement in a final judgment in one former case (Case No. U-15988) and asking to block the reconciliation in a second case (Case No. U-16568).

Since the Commission had already ruled that *Detroit Edison* did not invalidate UPPCo's agreement in Case No. U-16568, and Enbridge did not present the new evidence required to trigger a new review by the Commission of a fully litigated issue, there was no reason for the Commission to revisit the issue in response to Enbridge's complaint. See *In re Consumers Energy Application*, 291 Mich App at 122 ("[I]ssues fully decided in earlier PSC proceedings need not be 'completely relitigated' in later proceedings unless the party wishing to do so establishes by new evidence or a showing of changed circumstances that the earlier result is unreasonable."). The Commission should not have to relitigate these issues, and considerations of finality should bar Enbridge's efforts to collaterally attack *two* distinct final judgments.

II. *Dodge v Detroit Trust Co*, 300 Mich 575, 613 (1942) is relevant, and the Court of Appeals misapplied it by holding that it did not save a settlement agreement that included a revenue decoupling mechanism for an electric utility.

This Court's decision in *Dodge* was intended to guard against the scenario that unfolded in this case. In 2009, UPPCo, the MPSC staff (representing the public's interest), and four other parties entered into a settlement agreement adopting a revenue decoupling mechanism. Public Act 295 of 2008 had just been enacted. It did not expressly prohibit revenue decoupling mechanisms for electric utilities, and no court had yet interpreted it to prohibit these mechanisms. Despite this, the Court of Appeals held that no reasonable person could have believed the mechanisms were lawful at the time, and the court refused to honor a settlement agreement that took the opposite view. This Court's decision in *Dodge* should have precluded this result.

In *Dodge*, 300 Mich at 613, this Court held that "where a doubt as to what the law is has been settled by a compromise, a subsequent judicial decision . . . [to the contrary] affords no basis for a suit . . . to upset the compromise." For this rule to apply, there must be an "honest dispute between competent legal minds" on the subject. *Id*. at 614. An honest dispute about the law arises when (1) no court has interpreted the statutory language at issue and (2) the statutory language is ambiguous or inconsistent with the statute as a whole. There was an honest dispute about the law in this case, and the Court of Appeals misapplied *Dodge* by holding that it did not apply to save the settlement agreement at issue.

A. *Dodge* is relevant to this case because it controls whether a settlement agreement resolving a disputed issue of law survives a later court decision resolving the issue differently.

Michigan courts uphold settlement agreements that are knowingly entered into; Michigan courts even honor agreements between parties resolving disputes about applicable law. *Dodge v Detroit Trust Co*, 300 Mich at 614; accord *Detroit Trust Co v Neubauer*, 325 Mich 319, 342–343 (1949). In *Dodge*, a party to a will contest, John Duval Dodge, sought to set aside a settlement agreement disposing of his claim to his father's considerable estate (his father, John F. Dodge, was the co-founder of Dodge Brothers, Inc.). At the time the parties entered into an agreement, there was "an honest dispute between competent legal minds as to what the law of perpetuities or restraint of alienation is." *Dodge*, 300 Mich at 614. Although courts later clarified the law on these issues, this later clarification did not upset the earlier settlement agreement based on a different understanding of law. *Id*. at 598, 614–615.

In *Dodge*, the Supreme Court relied on "*a host of decisions* which recognize that, where a doubt as to what the law is has been settled by a compromise, a subsequent judicial decision by the highest court of the jurisdiction upholding the view adhered to by one of the parties affords no basis for a suit by him to upset the compromise." *Id*. at 614 (emphasis added). It cited several Georgia cases, which it synthesized into one succinct rule: "Where the parties have conflicting claims, depending on a law point, and they compromise them, each is bound by the settlement, whether the law point turns out to have been for or against them." *Id*. at 615. It also noted that the cases it cited from different jurisdictions "involve

settlements or disputes as to a great variety of legal questions." *Id.* Given that *Dodge* applies in many contexts, there is no reason that it should not apply to a legal question involving utility rates.

Other jurisdictions also abide by this rule. Recently, the Idaho Supreme Court has held that "[i]n an action brought to enforce an agreement of compromise and settlement, made in good faith, the court will not inquire into the merits or validity of the original claim." *Goodman v Lothrop*, 151 P3d 818, 821 (Idaho, 2007) (quotation marks and citation omitted); see also, e.g., *Zawaideh v Neb Dep't of Health & Human Servs*, 792 NW2d 484 (Neb, 2011) ("Generally speaking, where a doubt as to the law has been settled by a compromise, a subsequent judicial decision upholding a view favorable to one of the parties affords no basis for that party to upset the compromise."), citing *Dodge*, 300 Mich at 614; accord *Republic Nat'l Life Ins Co v Rudine*, 668 P2d 905 (Ariz App, 1983) ("[W]hen [a] settlement is characterized by good faith the court will not look into the question *of law* or fact in dispute between the parties, and determine which is right.") (citation omitted) (emphasis added).

The United States Supreme Court has even weighed in on the subject. In *Hennessy v Bacon*, 137 US 78 (1890), the Court considered whether parties who had settled a dispute about a land contract should be bound by their agreement. After first finding that there was no fraud or concealment involved, the Court held that "[s]uch a settlement ought not to be overthrown, even if the court should now be of

opinion that the party complaining of it surrendered rights that the law, if appealed to, would have sustained." *Id*. at 85.

The rule governing disputes of law in settlements is similar to the rule governing mistakes of law in settlements. "A mere misapprehension of the law is no ground for disturbing the settlement of a doubtful claim." *Donald v United States*, 39 Ct Cl 357, 365 (1904) (citation omitted). This rule applies equally in Michigan. See *Bomarko, Inc v Rapistan Corp*, 207 Mich App 649, 652 (1994) ("A mistake of law is usually not a ground for equitable relief absent inequitable conduct."). If courts will affirm an agreement even if the parties to the agreement misunderstand an *established* legal principle, courts should certainly uphold an agreement even though the parties misapply an *unsettled* legal principle, as in this case.

The Illinois Supreme Court has explained that the rule governing mistakes of law "rests on the sound basis that there can be no certainty or security in affairs unless every person is supposed to know the law . . . ." *Stover v Mitchell*, 45 Ill 213, 215–16 (1867). It said that "to overhaul a settlement of doubtful and conflicting claims, voluntarily made, with full knowledge of the facts, on the sole ground of a misapprehension of the law, would open the door to endless litigation. *Id*. at 216.

The same thing can be said about legal disputes resolved through settlement agreements. If parties to a settlement cannot agree to apply a law (one that has not been interpreted by any court) as they understand the law, it will discourage settlement and open the door to litigation that might otherwise have been avoided. For these reasons, *Dodge* applies in this case.

B. The Court of Appeals misapplied *Dodge* by holding that it did not apply to save the settlement agreement at issue.

When the parties to UPPCo's rate case (Case No. U-15988) entered into a settlement agreement, there was an ongoing dispute at the Commission about Act 295 and whether it permitted electric utilities to implement revenue decoupling mechanisms. In Consumers' and Detroit Edison's rate cases at the time, the Attorney General and the Association of Businesses Advocating Tariff Equity (ABATE) argued that the Commission lacked statutory authority to approve these mechanisms, but no one else took this position. See, e.g., *In re Consumers Energy Co Application*, MPSC Case No. U-15645, the Attorney General's Initial Br (July 9, 2009), pp 28–29, at http://efile.mpsc.state.mi.us/efile/docs/15645/0434.pdf.

Despite the debate, the parties to Case No. U-15988 entered into a settlement agreement allowing UPPCo to implement an electric decoupling mechanism. *In re Upper Peninsula Power Co's Application for Rate Increase*, Case No. U-15988, 12/11/09 Settlement Agreement, pp 5–6. By agreeing to the mechanism, the parties agreed that Act 295 allowed for electric decoupling mechanisms – if they had not agreed that the mechanisms were legal, they presumably would not have entered into an agreement creating one.

There were two good reasons to believe that electric revenue decoupling mechanisms were legal.

For one, the Commission had been approving other ratemaking mechanisms for years that were similar to a revenue decoupling mechanism: these other mechanisms tracked specific utility expenses and ensured that utilities were not

recovering more or less than their actual expenses. For example, the Commission approved uncollectable expense tracking mechanisms, storm expense tracking mechanisms, and line-clearance expense tracking mechanisms, and courts upheld the orders approving these mechanisms.[4]

Electric decoupling mechanisms, like these other mechanisms, were requested by utilities. The Commission did not force utilities to adopt them; rather, consistent with its ratemaking authority, the Commission merely allowed utilities to implement them and approved the resulting rates. Cf *Union Carbide Corp v Pub Serv Comm*, 431 Mich 135, 162 (1988) (holding that the Commission does not have the "power to make management decisions" in the same way that it has "authority to set utility rates.").

Second, Act 295 did not expressly prohibit the Commission from approving the mechanism. Although the Act required the Commission to approve gas decoupling mechanisms, it did not expressly eliminate the discretion that the Commission previously had, under its broad ratemaking authority, to approve ratemaking mechanisms like electric decoupling mechanisms. *ABATE v Public Service Comm*, 208 Mich App 248, 258 (1994) ("[T]he PSC is not bound by any particular method or formula in exercising its legislative function to determine just and reasonable rates.")

[4] In *In re Mich Consol Gas Application*, 281 Mich App 545, 549–550 (2008), the Court of Appeals approved an uncollectible expense tracking mechanism. And in *Attorney General v Pub Serv Comm*, 262 Mich App 649, 651–652 (2004), the Court of Appeals approved a storm expense tracker.

Ultimately, the Court of Appeals was not convinced by these arguments, *Detroit Edison*, 296 Mich App at 110, and held that the Legislature had intended to strip the Commission of its authority to approve electric decoupling mechanisms. Although the Commission accepted the Court of Appeals' decision without appeal, the Commission still had to decide what to do about mechanisms that it approved earlier through settlement agreements. The Commission decided to let these agreements run their course and not approve any new electric decoupling mechanisms once they expired. The Commission relied on *Dodge*, which decreed that the Court of Appeals' order in *Detroit Edison* did not upset earlier agreements creating electric decoupling mechanisms. *In re complaint of Enbridge Energy, Ltd,* Case No. U-17077, 5/13/14 order, p 11 (Appendix G to this Brief), citing *Dodge,* 300 Mich at 614.

The Court of Appeals again disagreed and held that *Dodge* did not apply because "reasonable minds could not have disputed the extent of the PSC's authority at the time it approved the settlement." *Enbridge Energy*, 313 Mich App at 678. The Court of Appeals was wrong. The Commission has just described the many reasons parties had to believe that the Commission possessed this authority. These reasons may not have prevailed, but they were at least reasonable.

Indeed, the Commission is still convinced that it was right about the scope of its authority. The Commission had ratemaking authority, before Act 295 was enacted, to approve revenue decoupling mechanisms. Act 295 did not delegate new authority; it merely required the Commission to take action that was previously

discretionary (decouple gas providers' rates). The Commission still had discretionary authority to decouple electric providers' rates. Likewise, the *Detroit Edison* Court's analysis – that Act 295 stripped the Commission of its ratemaking authority to approve rates based upon an electric decoupling mechanism – is not the only reasonable interpretation of that statute.

The *Detroit Edison* Court noted that Act 295 said that the Commission must approve gas decoupling mechanisms, while also saying that the Commission must send a report about electric decoupling mechanisms to the Legislature. *In re Detroit Edison Co*, 296 Mich App at 109–110. It is also reasonable to interpret the statute to mean that while the Legislature believed it had enough information about gas decoupling mechanisms that it felt comfortable making those mechanisms mandatory, it left the Commission's discretion to approve (but not mandate) electric decoupling mechanisms intact and asked for a report so it could study the issue further. Armed with the report, a future Legislature might decide to mandate that the Commission approve electric decoupling mechanisms.

There is a difference between what the Commission may approve and what the Commission may mandate. There are innumerable ratemaking methods proposed by the utilities that the Commission approves because they result in just and reasonable rates, but are not specifically laid out in statute. See, e.g., *In re Detroit Edison Co*, 296 Mich App at 112–114 (approving a tracker for storm and non-storm restoration expenses, line-clearance expenses, and for uncollectible expenses.) Likewise, in the famous retail wheeling case, the Commission could not

mandate retail wheeling, but that did not mean that the utility could not voluntarily engage in retail wheeling or that the Commission could not approve a rate for the voluntary practice. See *Consumers Power Co v Pub Serv Comm*, 460 Mich 148, 158–159 (1999). Certainly, the parties in the UPPCo rate case were not unreasonable in thinking the Commission could approve an electric decoupling mechanism proposed by the utility, contrary to the Court of Appeals' conclusions below.

Even if the Commission was wrong about the scope of its authority, there should be no doubt that there was an "honest dispute between competent legal minds" on the subject. See *Dodge*, 300 Mich at 614. Consistent with *Dodge*, the Court of Appeals should have protected the agreement resolving this dispute from subsequent judicial review. *Id*. at 613–614. Like the other paths to the right decision, this path promotes finality.

C. The legal principle this Court first adopted in *Dodge* is not unrestrained; there are limiting principles.

Applying *Dodge* in this case will not invite parties to circumvent the law through settlement agreements. The Oregon Supreme Court has held that "[i]t is not every disputed claim, . . . which will support a compromise [of the law that will survive judicial review], but it must be a claim honestly and in good faith asserted, concerning which the parties may bona fide and upon reasonable grounds disagree." *Smith v Farra*, 28 P 241, 242 (Or, 1891).

If this Court decides it is necessary, it could define and limit the type of honest, good-faith disputes of law that parties may settle. It could clarify that honest disputes arise only when (1) no court has interpreted the statutory language in question or decided the legal issue being debated, (2) if statutory language is in question, the language is ambiguous or inconsistent with the statute as a whole, and (3) the debate is between competent legal minds.

The third point is already good law. See *Dodge*, 300 Mich at 614 (holding that there must be an "honest dispute between competent legal minds" on a subject before courts will honor a compromise on the subject). The first and second points are natural extensions of the rule governing disputes of law, and they make sense. If a court has already interpreted the statutory language in question or decided the legal issue being debated, there cannot be an honest dispute on the issue. Likewise, if the statutory language in question is not ambiguous or internally inconsistent, no one can honestly claim that the statute is doubtful. Since an honest dispute cannot exist in these circumstances, they already shape our understanding of what an honest dispute is.

These three criteria are present in this case. This settlement agreement was entered into by competent minds, no court had decided the issue, and the statute was ambiguous.

III. Even if *Dodge* did not apply, Enbridge was barred from arguing that the settlement agreement was invalid.

In addition to being procedurally barred from challenging the *orders and issues* at stake because of their finality, Enbridge is barred from challenging the *settlement agreement* creating UPPCo's revenue decoupling mechanism. Allowing Enbridge to upset the agreement would violate longstanding precedent honoring settlement agreements.

A. Courts may not disregard settlement agreements unless there was a mistake, fraud, coercion, or an unconscionable advantage.

Signed settlement agreements that are submitted to the court in writing or stated on the record are binding on the parties to the agreement, MCR 2.507(G), assuming that there are no defenses to the formation of the agreement. There are several possible defenses. If there was no meeting of the minds when the agreement was formed because of a mutual mistake or for some other reason, or if there was no consideration, then the agreement was void when it was created. *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 453 (2006) ("[A] contract requires mutual assent or a meeting of the minds on all the essential terms."). Likewise, if one party lacked the capacity to contract or was induced to enter an agreement by coercion, duress, or fraud, the agreement can be voided.[5] See *Morris v Metriyakool*,

[5] The Commission uses the terms "agreement" and "contract" interchangeably here because settlement agreements are "governed by the legal principles applicable to the construction and interpretation of contracts." *Kloian*, 273 Mich App at 452.

418 Mich 423, 440 (1984) (naming the contract defenses of mistake, coercion, duress, and fraud).

This Court has held that "[t]he law looks with favor on fairly made settlements, and they are conclusive on the rights of the parties to them." *Musial v Yatzik*, 329 Mich 379, 383 (1951). Similarly, the Court of Appeals has said that settlement agreements are favored in Michigan and that courts are "reluctant to set them aside." *Metropolitan Life Ins Co v Goolsby,* 165 Mich App 126, 128 (1987). The *Goolsby* Court did not go far enough; courts are not just reluctant to set aside settlement agreements, they cannot set them aside except in extraordinary circumstances. This Court has held that "no tribunal" has the right to disturb a compromise without "satisfactory evidence of mistake, fraud, or unconscionable advantage." *Prichard v Sharp*, 51 Mich 432, 435 (1883); accord *Plamondon v Plamondon*, 230 Mich App 54, 56 (1998).

These pro-settlement principles apply equally to settlement agreements in administrative proceedings (including rate cases) and to orders approving those agreements. The Administrative Procedures Act specifically allows parties to settle administrative proceedings. MCL 24.278(2) ("Except as otherwise provided by law, disposition may be made of a contested case by stipulation, agreed settlement, consent order, waiver, default or other method agreed upon by the parties."). And the Michigan Administrative Code encourages parties to settle administrative proceedings. Mich Admin Code, R 792.10431(1). Parties have been settling rate

cases for years and years, and Michigan courts have universally upheld orders approving these agreements.

Michigan courts have even upheld settlement agreements in Commission rate cases despite questions about whether the public's interest was adequately represented. In *Attorney General v Pub Serv Comm No 2,* 237 Mich App 82 (1999), the Consumers Energy Company and the MPSC staff were the only two parties to the case, but the Court of Appeals nonetheless held that "[p]articipation of fewer than all interested parties in the negotiation" did not mean that the public's interest was not represented. *Id*. at 94. Rather, the court agreed with the Commission that "the PSC staff adequately represented the public interest." *Id*. at 93–94; accord *Ass'n of Businesses Advocating Tariff Equity v Pub Serv Comm*, 216 Mich App 8, 25–26 (1996) (rejecting arguments that the Commission failed to "represent the public interest through the actions of its staff.").

In *Ass'n of Businesses Advocating Tariff Equity*, the Court of Appeals went still further by suggesting that it defers to Commission orders approving settlement agreements. The court said, "The MPSC utilized its administrative expertise to examine, modify, and approve the revised settlement proposal. . . . [T]his Court will not substitute its judgment for that of the MPSC." *Id*. at 26. Courts have used similar language when deferring to Commission orders. *Bldg Owners & Managers Ass'n v Pub Serv Comm*, 131 Mich App 504, 517 (1984) ("The reviewing court is to give due deference to defendant commission's administrative expertise and is not to

substitute its judgment for that of defendant commission."), citing *Yankoviak v Pub Serv Comm,* 349 Mich 641, 648 (1957).

B. There was no mutual mistake, fraud, or unconscionable advantage in this case.

Enbridge has not alleged that there was a mistake, fraud, or unconscionable advantage in this case, so it is barred from challenging the validity of the settlement agreement at issue. Many Michigan courts have prevented parties from challenging settlement agreements for this reason.

In *Groulx v Carlson*, 176 Mich App 484 (1989), for example, the parties entered into an agreement in open court settling a breach of contract action, but they later had a change of heart. The Court of Appeals held that the parties were "not free to disregard a settlement agreement knowingly entered into on the court record and to which satisfactory evidence of mistake, fraud, or unconscionable advantage is not evident." *Id*. at 492; accord *Plamondon*, 230 Mich App at 56. As a corollary, the court has said that a party cannot "void a settlement agreement merely because [he] has had a change of heart, nor can he do so merely because [his] assessment of the consequences [of the settlement] was incorrect." *Clark v Al-Amin*, 309 Mich App 387, 396 (2015) (alterations in original).[6]

[6] Enbridge should not be able to escape this requirement (prohibiting parties from acting on a change of heart) simply because it was not a party to the agreement. Enbridge could have intervened in the underlying rate case and participated in settlement negotiations, but it did not. (See Section I.A.2 of this Brief.) This Court should not allow Enbridge to use its own inaction to its advantage.

This Court specifically has upheld settlement agreements in the absence of fraud, mistake, or duress. See *Streeter v Mich Consol Gas Co*, 340 Mich 510 (1954). In *Streeter*, James and Anna Kish alleged that the Michigan Consolidated Gas Company damaged their property when laying a pipeline across their farm, but they accepted $596.08 in full payment for the damages. When Dale and Laurene Streeter bought the property, they discovered that the damage was worse than expected, so they attempted to void the settlement and sue for additional damages. This Court refused to do so. It held that since there was "no fraud claimed in the execution of the receipt [in full payment for the damages], . . . such receipt was in full satisfaction . . . for all damages done." *Id.* at 518. That is because settlements may not be set aside except for fraud, mistake, or duress. *Id.* at 517–518, quoting *Pratt v Castle*, 91 Mich 484 (1892) and *Lauzon v Belleheumer*, 108 Mich 444 (1896).

As in *Groulx* and *Streeter*, this Court should not allow Enbridge to challenge the settlement agreement in Case No. U-15988 because Enbridge has not alleged that the agreement was the result of a mistake, fraud, coercion, or duress. Although Enbridge claims the agreement was illegal, the Commission is not aware of any appellate decisions in this state that have voided settlement agreements for contradicting a court's later interpretation of a statute. The Court of Appeals' decision in *Enbridge* was the first of its kind. The decision should not be allowed to stand because it defies more than a hundred years of precedent respecting fairly made settlement agreements. Overturning *Enbridge* will ensure that fairly made settlements are binding on the parties to a case.

CONCLUSION AND RELIEF REQUESTED

There are three paths to the right decision in this case. Each path leads through important areas of law, and many of these areas would benefit from further clarity. But with or without additional clarity, each path promotes finality in administrative proceedings:

1. The first path is to acknowledge that Enbridge collaterally attacked the orders at issue after declining to participate in the cases or appeal the orders, which it may not do. The Commission did not have to relitigate issues it addressed in an earlier case.

2. The second path to the right decision is to follow another line of cases holding that courts honor settlement agreements of disputed issues of law, even if a court later resolves the dispute in a different way.

3. The third path is to follow a long line of cases holding that settlement agreements cannot be disregarded absent a mistake, fraud, coercion, or an unconscionable advantage – none of which were present here.

For these reasons, the Michigan Public Service Commission respectfully requests that this Court grant its application for leave to appeal or, in the alternative, peremptorily reverse the Court of Appeals decision in *Enbridge Energy Ltd Partnership v Upper Peninsula Power Co*, 313 Mich App 669 (2015) and reinstate the Commission's order in *In re complaint of Enbridge Energy, Ltd,* Case No. U-17077, 5/13/14 Order (Appendix G to this Brief).

Respectfully submitted,

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